THE ROLE OF COURTS UNDER ASSET CONFISCATION LEGISLATION

OPP PROCEEDS OF CRIME CONFERENCE

Address by Justice Chris Maxwell
President, Court of Appeal, Victoria
6 October 2011

I am honoured to have been invited to address this conference. I do not, however, profess any particular expertise in the law of confiscation of assets. My intermittent encounters with the Victorian Act[1] have been quite eventful but, in a gathering such as this, I feel like an amateur amongst professionals.[2]

My focus today will be on the role of the judiciary under, and in relation to, confiscation legislation. It is appropriate to start with the legislative objectives and the principles which underpin those objectives. The legislative objectives are, by and large, uncontroversial. It is the means adopted to achieve those objectives which generate controversy.[3]

What the Australian Law Reform Commission[4] said in 1999 about the Commonwealth Act[5] is still, I think, of general application. The Commission said that the principal legislative objectives were twofold. The first was that those who gain material advantage from the commission of indictable offences should be able to be deprived of the whole of that advantage. This objective is founded on the principle that a person should not be unjustly enriched at the expense of other individuals, and society in general, as a result of criminal conduct.

The second objective was that those who used property, or permitted it to be used, in connection with the commission of indictable offences should be exposed to possible forfeiture of the property. This objective is based on the principles that:

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1 *Confiscation Act 1997* (Vic).

2 I wish to acknowledge the outstanding work of my associate, Sharyn Broomhead, who in turn has been much assisted by David Gray, the manager of the Proceeds of Crime Directorate at the Office of Public Prosecutions, Victoria.

3 See, for example, S Odgers, "Proceeds of Crime: Instrument of Injustice?" (2007) 31 Crim LR 330.

4 Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999).

5 At that time, the *Proceeds of Crime Act 1987* (Cth).

(a) property used in connection with commission of a criminal offence should be able to be confiscated, in order to render it unavailable for similar future use in connection with such conduct; and

(b) such confiscation should be available as an additional punitive sanction for such conduct, separate from the traditional sanctions of fines and imprisonment.

There are thus three distinct principles at work, namely that:

- persons should not be unjustly enriched by reason of unlawful conduct;
- property used in connection with criminal conduct should be liable to confiscation; and
- criminal wrongdoing should attract appropriate punishment.[6]

Depriving criminals of the profits of their criminal activity is seen as important for both specific and general deterrence. As French CJ said in relation to civil forfeiture in the *International Finance Trust* case,[7] there is:

> "widespread acceptance by governments around the world and within Australia of the utility of civil assets forfeiture laws as a means of deterring serious criminal activity which may result in the derivation of large profits and the accumulation of significant assets."

Writing in 1989, the then Commonwealth Director of Public Prosecutions, Mark Weinberg (now a member of the Victorian Court of Appeal), said:

> "Punishment, whether by fine or imprisonment, will seldom of itself, without a proper system of asset recovery, constitute a sufficient deterrent to the kind of criminal behaviour with which the Commonwealth is typically concerned. Revenue fraud in all its various forms, and large scale narcotics offences, are committed usually in order to satisfy greed. Knowledge that the profits of

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6 The relationship between sentencing and confiscation in Victoria is complex. As to the distinction between disgorgement of profits (not a penalty) and forfeiture of lawfully-acquired property (penalty), see *R v McLeod* (2007) 16 VR 682, [14]–[23].

7 *International Finance Trust Company Limited v NSW Crime Commission* (2009) 240 CLR 319, 345 [29].

> criminal behaviour will ultimately be lost is a valuable adjunct to the principal goals of the criminal justice system."[8]

Tom Sherman AO in his 2006 review of the Commonwealth Act[9] said:

> "It is difficult to evaluate the effectiveness of the Act in a precise way. The extent to which criminals are deprived of their assets can be assessed to some degree in the statistics … but the extent to which criminals are deterred from committing further crime is harder to measure."[10]

The evolution of confiscation legislation, over the more than two decades since the 1987 Commonwealth Act came into force, has reflected a continuing quest for more effective means of achieving these objectives. Mr Sherman said in 2006 that, with the passage of time, conviction-based laws were found to be ineffective and so jurisdictions increasingly introduced non-conviction–based forfeiture laws.[11] It was axiomatic, he said, that the effectiveness of such laws could be further improved.[12]

I am not going to speak about the effectiveness of the laws. That is a matter for you as administrators and, ultimately, for the legislature. Instead I will try and sketch out how courts may be expected to respond when proceedings are commenced under provisions such as these. For so long as the courts are asked to play a role in this area, you will need to be alive to what courts will expect of you as prosecutors.

The judicial function

Not every forfeiture of assets results from a court order. As you would know, there are provisions at both Commonwealth and State level which allow for automatic forfeiture of property in specified circumstances. For example, s 228(1) of the *Customs Act 1901,* provides for the forfeiture of any ship or aircraft used in the importation of

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8 "The Proceeds of Crime Act – New Despotism or Measured Response?" (1989) 15 *Mon ULR* 201, 204.

9 By then, the *Proceeds of Crime Act 2002* (Cth). This was the "independent review" required by s 327 of that Act. See T Sherman, "Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)" (July 2006), available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportontheIndependentReviewoftheOperationofthePrceedsofCrimeAct2002(Cth).

10 Sherman 2006 p 23–4 [3.42]–[3.47].

11 Ibid p 5.

12 Ibid p 24 [3.50].

prohibited imports, and s 229(1) which provides for the forfeiture of the prohibited imports themselves.

Likewise, the Victorian *Confiscation Act*, s 35 provides for automatic forfeiture after the expiry of 60 days from conviction of a schedule 2 offence, provided that a restraining order applies to the property and it has not been the subject of an exclusion order.

But the courts continue to play a central role in the operation of these laws. In most jurisdictions, it is only on application to a court that the enforcing authority may secure:

- a restraining order;[13]
- a forfeiture order;[14] or
- a pecuniary penalty order.[15]

Likewise, applications for the exclusion of property from a restraining order or a forfeiture must be determined by the Court.[16]

Axiomatically, the law is for Parliament to make and for the courts to interpret. Judges will take the legislation as they find it. Parliament's intention is to be discerned from the words actually used in the statute, as understood in the context of the statute as a whole.[17] The legislative policy is exclusively within the province of the Parliament and, under the usual interpretive provisions, courts are obliged (where there is a choice of interpretations available) to prefer an interpretation which will advance that policy. (The Victoria Court of Appeal noted this requirement in *DPP v Ali*.[18])

Less well known, but equally important, is the axiom that the legislature takes the court as it finds it. This principle was enunciated, with the clarity of expression so characteristic of Chief Justice Dixon, in

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13 See, for example, *Confiscation Act 1997* (Vic) s 18.

14 After conviction: s 32, 33 (hardship s 33(5), (6)); civil forfeiture: s 38 (hardship s 38(2)) and s 45 re relief from hardship.

15 Part 8.

16 Section 20 (restraining order), s 22 (automatic forfeiture), s 24 (civil forfeiture), Part 6 (automatic forfeiture).

17 See also *Wilson v Anderson* (2002) 213 CLR 401, 418 [8]–[9] (Gleeson CJ); *Byrnes v the Queen* (1999) CLR 1, 34 [80] (Kirby J); *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Limited* (2008) 232 CLR 314; *Spencer v Commonwealth* [2010] 84 ALJR 612; [50]; *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [33]–[55]; and see generally, J Spigelman, "The Intolerable Wrestle: Developments in Statutory Interpretation" (2010) 84 ALJ 822.

18 (2009) 23 VR 203, 216 [44] referring to *Interpretation of Legislation Act 1984* (Vic) s 35(a).

a 1956 judgment of the entire High Court in *Electric Light and Power Supply Corporation Limited v Electricity Commission of New South Wales*.[19] The key passage is that which was cited in the joint judgment of Hayne, Crennan and Kiefel JJ in the *International Finance Trust* case:[20]

> "When the legislature finds that a specific question of a judicial nature arises but that there is at hand an established court to the determination of which the question may be appropriately submitted, it may be supposed that if the legislature does not mean to take the court as it finds it with all its incidents including the liability to appeal, it will say so. In the absence of express words to the contrary or of reasonably plain intendment the inference may safely be made that it takes it as it finds with all its incidents and the inference will accord with reality."[21]

Central to the judicial process is the obligation to accord procedural fairness to any person whose rights or interests may be adversely affected by orders sought in the proceeding. As French CJ emphasised in *International Finance Trust:*[22]

> "Procedural fairness or natural justice lies at the heart of the judicial function. In the federal constitutional context, it is an incident of the judicial power exercised pursuant to Ch III of the Constitution. It requires that a court be and appear to be impartial, and provide each party to proceedings before it with an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it. According to the circumstances, the content of the requirements of procedural fairness may vary. When an ex parte application for interlocutory relief if made the court, in the ordinary course, has a discretion whether or not to hear the application without notice to the party to be affected."

In the same case, Heydon J drew attention to the "centrality of hearings" in the judicial process:

> "One of the primary principles on which the judicial process in this country operates is the principle that before any judicial decision is made which has substantive consequences there generally should be a 'hearing'. A hearing takes place before a judge at a time and place of which the moving party has given notice to the defending party. At it both parties have an opportunity to tender evidence

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19 (1956) 94 CLR 554, 560.

20 240 CLR 319, 375 [127].

21 See also [165] per Heydon J.

22 At [54].

> relating to, and advance arguments in favour of, the particular orders they ask for. This aspect of the rules of natural justice pervades Australian procedural law. It has several justifications, and their force is so great that exceptions to the hearing rule in judicial proceedings are very narrow."[23]

It is, of course, open to Parliament to exclude the principles of natural justice by express provision or, exceptionally, by necessary implication. Two questions arise: does the statutory language disclose that intention and, if so, what are the consequences? I deal first with the interpretive task.

The approach to interpretation

How will a court approach the question whether the legislature has excluded procedural fairness (that otherwise being a necessary incident of the exercise of judicial power)?

It is again of assistance to refer to what the Chief Justice said in the *International Finance Trust* case. The starting-point will be what his Honour referred to as

> "the conservative principle that, absent clear words, Parliament does not intend to encroach upon fundamental common law principles, including the requirement that courts accord procedural fairness to those who are to be affected by their orders."[24]

In *Director of Public Prosecutions v Vu,*[25] the Victorian Court of Appeal said:

> "The common law right to be heard is not lightly displaced and hence … a court should approach the construction of a statute with a presumption that the legislature does not intend to deny natural justice. Thus, where legislation is silent on the matter, it may be presumed that the legislature has left it to the court to prescribe and enforce the appropriate procedure to ensure natural justice."[26]

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23 *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319, 379–80 [141].

24 Ibid 349 [41].

25 (2006) 14 VR 241.

26 [22], citing *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 109–10.

In that case, the Court was not persuaded that

> "the structure of the Act in general, or s 20 of it in particular, evinces an intention to exclude in all cases where an application has been made [for a restraining order] the operation of the common law right to be heard. To the contrary, in our view the legislation impliedly recognises the right and in large part provides for it to be given effect. In so far as it excludes natural justice it does so only to a limited extent and in circumstances that are spelt out in the Act."[27]

The second interpretive principle is the corollary of the first. It is this:

> "If parliament has used clear words to encroach upon the liberty or rights of the subject or to impose procedural or other constraints upon the courts its choice should be respected even if the consequence is constitutional invalidity."[28]

These are very important principles. The first is often referred to as "the principle of legality", the principle that Parliament is presumed not have intended to take away or limit fundamental rights unless that intention is unambiguously expressed.[29] It is a powerful principle, whose long pedigree in the common law underlines the fact that, well before the advent of legislative protection of human rights, common law courts were the guardians of individual rights and freedoms.

The second principle recognises the sovereignty of Parliament. Where Parliament has determined that an infringement of rights is necessary for the achievement of some public policy objective, and has done so with the requisite clarity of legislative expression, it is not for the courts to second-guess that policy choice.

That is what the Victorian Court of Appeal meant in *DPP v Ali*[30] when it said:

> "We have already concluded, for reasons set out earlier, that there is no ambiguity in the language of s 16 of the Act. It follows that

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27 [25]. See also *Navarolli v Director of Public Prosecutions (Vic)* [2005] 159 A Crim R 347.

28 *International Finance Trust Company Limited v NSW Crime Commission* (2009) 240 CLR 319, 349 [42].

29 See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ); and *Momcilovic v The Queen* (2010) 24 VR 436 [103]–[104]. See, generally, A M Gleeson, "The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights: (2009) 20 PLR 26. See R Sackville, "Bills of Rights: Chapter III of the Constitution and State Charters (2011) 18 Aust J Admin Law 67.

30 (2009) 23 VR 203, 218 [51]–[55].

> there is no room for the application of principles dealing with strict interpretation of ambiguous legislative provisions dealing with forfeiture of property. Likewise, the plain and unambiguous meaning of the provisions leaves no room for the operation of the presumption against legislative interference with vested property rights. Plainly enough, the Act does interfere with property rights, and modifies many common law protections. Equally clearly, Parliament has done this deliberately. It has enacted a statute which contains its own procedures and protections. The fact that these procedures and protections are not as fair or comprehensive as those under common law does not mean that the courts are at liberty to modify them so that they accord with traditional values."[31]

The ordinary meaning of words in a statute

Of more immediate importance to your enforcement work is the interpretive assumption that legislation means what is says and that words are to be given their ordinary meaning. In a passage which the Victorian Court of Appeal cited in *Momcilovic*,[32] French CJ said in *International Finance Trust*:

> "… [T]hose who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished."[33]

The Court of Appeal also adopted the following statement made by his Honour, when a member of the Federal Court, in *NAAV v Minister*:[34]

> "In a representative democracy those who are subject to the law, those who invoke it and those who apply it are entitled to expect that it means what it says. That proposition informs the approach of courts to the interpretation of laws in taking as their starting point the ordinary and grammatical sense of the words."

As *Momcilovic* thus made clear, the Court of Appeal will take as its starting point the ordinary and grammatical sense of the words used in

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31 *DPP v Ali* (2009) 23 VR 203, 218 [54]–[55].

32 *Momcilovic v The Queen* (2010) 24 VR 436, 463–4 [98].

33 (2009) 240 CLR 319, 349 [42].

34 *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 410.

the statute. As administrators of the legislation, you should approach the provisions in exactly the same way. Remember – if a legislative provision does not make sense to you, it is unlikely to make sense to a judge.

If you are involved in developing proposals for amendment and you think the draft amendments are not clear enough or do not achieve what was intended, send them back for redrafting. As Chief Justice French has pointed out, the "ordinary meaning" approach to interpretation promotes certainty and accessibility of the law. As litigants on behalf of the public interest, you should insist on nothing less.

The consequences of excluding natural justice

I turn finally to consider what it means when the legislature excludes natural justice from a judicial process in which property rights can be interfered with. As *International Finance Trust* illustrates, the consequences may be dramatic. By majority, the High Court held the relevant provision to be invalid, on the ground that it engaged the Supreme Court of New South Wales in an activity "repugnant to the judicial process in a fundamental degree". In other words, the *Kable*[35] principle was held to be applicable.[36]

A fortnight later, the New South Wales Parliament amended the legislation, so as to confer on the court a discretion to notify an affected person of ex parte proceedings and to give a notified person the right to be heard.

As the Australian Institute of Criminology noted in its 2010 review of Australian confiscation schemes,[37] the High Court decision was not universally acclaimed. Apparently, Senator Hutchins (who had recently chaired a joint Parliamentary inquiry into the Australian Crime Commission) told the Federal Council of the Police Federation of Australia that Chief Justice French had acted "with a complete disregard for the interests of public order and justice".

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35 *Kable v DPP (NSW)* (1996) CLR 51.

36 See, by way of contrast, *Silbert v DPP (WA)* (2004), 217 CLR 181, where provisions for deemed conviction were held not to attract *Kable* principles, as they merely "described the circumstances in which operative provisions were enlivened" [13].

37 L Bartels, 'A review of confiscation schemes in Australia' (2010) *Australian Institute of Criminology Technical and Background Paper 36*, 13.

Someone with a sharper appreciation of democratic fundamentals would have seen things rather differently. What happened was a demonstration of the separation of powers in action. It is vital for the health of our democracy that courts are ready and willing to perform their constitutional duty, by ensuring that both legislative and executive action remain within the limits of legal validity.

The legislative response was precisely what might have been expected. That is, the legislature sought to preserve the legislative scheme while ensuring that the role assigned to the Supreme Court in the enforcement of the confiscation law did not require it to behave in a non-judicial manner.

Conclusion

The court is neither the friend nor the enemy of confiscation law. Our role as judges is quite different. You can expect courts to approach each enforcement proceeding dispassionately, independently and impartially, seeking to ensure that the legislative requirements, and the requirements of due process, have been complied with. Proper proof of facts in issue will be insisted upon. Counsel, whose duty to the court is paramount, will be expected to disclose all relevant matters, whether helpful or unhelpful to the claim being advanced.

Thus understood, the role of the courts should be seen as both necessary and beneficial. The maintenance of judicial oversight over enforcement proceedings, and the power of the court to alleviate unjustifiable hardship, are conducive to public confidence in the legislative schemes you are charged with administering.